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No. 84-1236

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

DONALD A. CABANA, SUPERINTENDENT, ET AL.,

Petitioners,

—v.—

CRAWFORD BULLOCK, JR.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT

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QUESTION PRESENTED FOR REVIEW

1. In a state where all capital sentencing findings must be made by the jury, may an individual convicted of felony murder be sentenced to death without any finding by the jury that he killed, attempted to kill, intended to kill, or contemplated that lethal force would be used?

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to the constitutional and statutory provisions set forth in the Brief for Petitioners, the following statutory provisions are involved, as set forth in the Appendix below.

1. MISS. CODE ANN. § 97-3-19 (since amended), HOMICIDE; MURDER DEFINED; CAPITAL MURDER.
2. MISS. CODE ANN. § 99-19-101 (since amended), JURY TO DETERMINE PUNISHMENT IN CAPITAL CASES IN SEPARATE SENTENCING PROCEEDING; AGGRAVATING AND MITIGATING CIRCUMSTANCES TO BE CONSIDERED.

3. MISS. CODE ANN. § 99-19-101 (Cum. Supp. 1984), JURY TO DETERMINE PUNISHMENT IN CAPITAL CASES IN SEPARATE SENTENCING PROCEEDING; AGGRAVATING AND MITIGATING CIRCUMSTANCES TO BE CONSIDERED.

4. MISS. CODE ANN. § 99-19-103 (Cum. Supp. 1984), INSTRUCTIONS; AGGRAVATING CIRCUMSTANCES SHALL BE DESIGNATED BY JURY IN WRITING; EFFECT OF JURY'S FAILURE TO AGREE ON PUNISHMENT.

INTRODUCTION

Respondent, Crawford Bullock, Jr., was sentenced to death in 1979 under the Mississippi felony murder statute. Because he was indicted, tried, and convicted for aiding and abetting in a robbery in the course of which the victim was killed by another, Bullock's jury was not required to—and did not—find that he killed, attempted to kill, intended to kill or contemplated the use of lethal force. Bullock was convicted and sentenced to death under the Mississippi statutes identified by this Court in *Enmund v. Florida*, 458 U.S. 782 (1982), as among only eight state statutes authorizing the death sentence in felony murder cases without the finding of personal culpability mandated by the Eighth Amendment. *Id.* at 789 n.5. (Mississippi has since amended its capital sentencing statute to cure the defect that allowed Bullock to be sentenced to death in violation of *Enmund*. *See* Miss. Code Ann. § 99-19-101 (Cum. Supp. 1984) (5a)[1].)

The Court of Appeals for the Fifth Circuit vacated Bullock's death sentence because of the failure of the State of Mississippi to comply with the constitutional requirements of *Enmund*. That decision should be affirmed.

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1 References in this form are to the Appendix at the end of this brief. References preceded by "TR" are to the trial transcript. References preceded by "HC" are to the federal habeas corpus transcript. References preceded by "A" are to the Appendix to the petition for certiorari. References preceded by "JA" are to the Joint Appendix.

STATEMENT OF THE CASE

A. The Respondent

At the time of the crime, respondent, Crawford Bullock, Jr., a white male, was 21 years old. Bullock was employed, and had received an honorable discharge from the Marines. He had a personal and family history of mental illness and alcohol and drug abuse, and a minor criminal record, which did not include any felonies or crimes of violence.[2]

Bullock was born in July 1957, and grew up in and around Jackson, Mississippi. (TR 1339-40, 1343) His childhood was marred by a mentally ill mother who abused alcohol and drugs, who attempted suicide on several occasions, and who was repeatedly institutionalized in a state facility for the mentally ill. (TR 5-6, 1340; HC 147-8, 227) Bullock, his uncle, and his sister also attempted suicide at some time in their lives. (TR 5-6) Bullock's parents were divorced when he was 16 years old. (HC 147)

Bullock dropped out of school after the eighth grade (TR 1339), and he enlisted in the Marines in July 1974, shortly after his seventeenth birthday. (TR 1341, 1351) Bullock obtained his high school equivalency diploma in the Marines, and was awarded several citations, including a meritorious mast for outstanding duty, a national defense service medal and a rifle expert badge. (TR 1341, 1344-45, 1351) An injury cut short Bullock's military career, and he received an honorable medical discharge in April 1976. (TR 1343, 1351) Returning to civilian life, Bullock held a series of jobs, and contributed to the support of his sister. (TR 1344)

Bullock has had problems with alcohol and drug abuse, for which he has been hospitalized on several occasions. (TR 6, 181-82) He also has had psychiatric problems, and has been diagnosed as suffering from "poly-drug abuse and habitual

---

2 Bullock's record consisted of misdemeanor convictions for possession of marijuana, resisting arrest, petty larceny, possession of a stolen automobile tag, a traffic violation and trespassing. (TR 1342)

excessive alcohol abuse, as well as a probable underlying personality disorder." (TR 181-82) He has been diagnosed as psychotic. (TR 1056)[3]

B. The Crime[4]

In late September 1978, Bullock was on temporary disability leave from his job at American Cyanamid, as the result of a broken ankle received in a motorcycle accident. (TR 1091-92) His left leg was in a knee-high plaster cast. (TR 1086, 1092) On Thursday, September 21, Bullock, who had just received a disability check, asked a friend to take him to the Town Creek Saloon, a bar in Jackson. (TR 1091-93) One of the people who accompanied them to the bar was Ricky Tucker.[5] (TR 1093)

Bullock consumed both alcohol and drugs during the course of the evening. (TR 565-66, 1046, 1227) When he left the bar at about 1:30 a.m., he realized that the person who had driven him to the bar had gone without him. (TR 1095-96) He waited in the parking lot to see if someone else he knew would drive him home. (TR 1097) He was joined there by Tucker, who had also been drinking and taking drugs, and who had been in a fight at the bar earlier in the evening. Tucker had also been left without a ride home. (TR 1046, 1096-97)

At that point, Mark Dickson left the bar. Dickson had himself been engaged in an evening of drinking, having spent

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3 Bullock was unable to adequately develop the degree of his mental problems for use in his defense. His motion for funds to employ a psychiatrist was denied, which led his counsel to answer "not ready" for trial. (TR 175-80)

4 Petitioners purport to set forth the substantive facts "as found by the Mississippi Supreme Court," Pet. Brief at 8, but do not do so. As noted below, at several points in their statement of facts petitioners depart from the record, the factual recitation of the Mississippi Supreme Court, and the factual statement of every other court that has reviewed this case, and simply invent "facts" favorable to their theory of the case.

5 Although it is undisputed that Tucker was the "triggerman" in the murder for which Bullock was sentenced to death, in a separate trial he received a life sentence. (HC 135-36)

the earlier part of the evening at another bar with some friends, and then having come to the Town Creek Saloon by himself. (TR 747-48, 761) Bullock and Dickson knew each other vaguely (TR 1046); Tucker and Dickson apparently had had drug dealings. (TR 1105, 1170)

Dickson offered Tucker and Bullock rides to their homes. Because of the cast on Bullock's leg, he sat in the front seat of the car; Tucker sat in the back. (TR 1097) The three young men continued drinking as they passed around one of several bottles of whiskey that were in Dickson's car. (TR 716, 1098)[6]

During the ride, Bullock asked Dickson to stop at a store so he could buy a loaf of bread. Dickson did so and loaned him 35 cents to make the purchase. The store was out of bread, and Bullock returned the change to Dickson. (TR 1099-1100) Later in the ride, Bullock asked Dickson to stop so that he could relieve himself, and Dickson did so. (TR 1101) As Bullock was returning to the car, he heard Tucker and Dickson arguing about a drug sale that Tucker had previously made to Dickson for which Dickson had apparently not yet paid Tucker. Bullock testified:

> When I was coming back from the woods, I heard Ricky [Tucker] saying something about—he said: "Look, you got the drugs. Now give me my money" or something like that.
>
> . . . .
>
> Mark [Dickson] said: "I don't have any money to pay you with" . . . .

(TR 1105)[7]

---

6 The bottle had been full earlier in the evening (TR 716-17), but Dickson apparently had already consumed one-quarter of it before he offered Tucker and Bullock the ride home. (TR 1098)

7 In describing this exchange, petitioners claim: "Dickson was thereupon heard to reply that he did not have any money but that they, Bullock and Tucker, could have the automobile." Pet. Brief at 10. In fact, Bullock's uncontradicted testimony was that "Mark said that Ricky could have the car

(Footnote continued on following page)

The ride resumed, but Dickson missed the turn to Tucker's home. (TR 1107) Tucker and Dickson began to argue about whose fault it was that the turn had been missed. (TR 1108) The argument escalated to the point where Dickson stopped the car and challenged Tucker to fight. Bullock testified:

> They kept up and kept up yelling at each other. Mark [Dickson] said—he just stated: "I'll just stop this car and whip your ass."
>
> . . . .
>
> Ricky [Tucker] said: "Go ahead."

(TR 1108)[8] Dickson began swinging at Tucker, who was trapped in the back seat of the two-door car. (TR 1109) Tucker yelled for Bullock to grab Dickson, and he did so in an effort to stop the fight. (TR 1109)

Dickson left the car to continue his fight with Tucker. Bullock testified:

> Mark [Dickson] opened the door. He pulled his arm away from me and got out of the car and he told Ricky [Tucker] to crawl his ass out of the car and let's get it on.

(TR 1109) Tucker then emerged from the car holding a whiskey bottle, and Dickson took flight with Tucker in close pursuit. (TR 1109) Tucker caught up with Dickson about 50 to 70 yards from the car, and tackled him. The fight between Dickson and Tucker continued, with Bullock still in the car. (TR 1109-10)

Bullock climbed out of the car and proceeded towards the fight, his progress slowed by the cast on his leg. (TR 1110) When he reached Tucker and Dickson, the fight between the two was even. (TR 1110) Bullock intervened in an attempt to break up the fight, first grabbing Tucker and then Dickson.

(Footnote continued from previous page)

if he wanted it." (TR 1106) Bullock's statement reads: "I then saw Mark take his billfold out and show it to Ricky and he said 'I don't have any money but you can take the car.' " (TR 1031)

8 Petitioners' statement that "Dickson, apparently fearing injury, as rightly he should have been, stopped [the car]," Pet. Brief at 11, is another misstatement of the record.

(TR 1110, 1121, 1180)[9] While Bullock was between Tucker and Dickson and holding Dickson back, Tucker swung the whiskey bottle over Bullock at Dickson. However, Tucker's swing hit Bullock on the right hand,[10] shattering the bottle and opening a deep gash on Bullock's hand. (TR 1110)[11] Bullock's hand immediately began to bleed profusely, and he backed away from the fight. (TR 1110)

The fight between Tucker and Dickson continued, without any involvement by Bullock. (TR 1111) Indeed, while Tucker was beating Dickson, Bullock attempted to start some cars at a nearby garage in an effort to get away from the fight. (TR 1111-12) Tucker eventually gained the upper hand and knocked Dickson down. (TR 1111) He then jumped up and down on Dickson's head. (TR 1111) Bullock yelled for Tucker to stop, but Tucker ignored him. (TR 1111) Tucker then beat Dickson with a heavy concrete block, repeatedly throwing the block (which weighed over 40 pounds (HC 338-39)) onto Dickson's head, yelling each time he threw the block down. (TR 1111) Death was caused by the blows struck by Tucker with the

---

9 Petitioners again misstate the record, claiming that when Bullock came to where Tucker and Dickson were fighting, "Tucker instructed Bullock to grab Dickson which he did. . . ." Pet. Brief at 10. There is no evidence in the record for this allegation, and the factual recitations of the Mississippi Supreme Court, the district court and the Fifth Circuit do not contain this alleged instruction by Tucker. The record is fully consistent with Bullock's testimony that he grabbed Dickson to break up the fight. (TR 1110, 1121, 1180)

10 Petitioners' statement that Tucker struck Dickson "several times in the head" with the bottle while Bullock was holding him and that Bullock's hand was cut some time "[d]uring this rain of blows" with the whiskey bottle, Pet. Brief at 10-11, is another of petitioners' inventions. There was only a single blow with the bottle, which broke on Bullock's hand. This is clear from the record (TR 1110), and from the factual recitations of the Mississippi Supreme Court (A71), the district court (A25), and the Fifth Circuit (A9). Again, the record is fully consistent with Bullock's testimony that he grabbed Dickson to break up the fight and was injured by the first—and only—blow with the bottle, which came from behind him. (TR 1110)

11 The injury to Bullock's hand was so severe that he was later hospitalized for a week. (TR 1060)

concrete block. (TR 930-34, 956-58) Tucker, "berserk" with rage, then beat Dickson's lifeless body with a wooden board. (TR 1111-12)

Bullock's minimal involvement in the drunken brawl between Dickson and Tucker ended when his hand was cut. That injury occurred very early in the fight while Dickson and Tucker were still even. (TR 1110-12) The trails of Bullock's blood corroborate his testimony that he backed away from the fatal fight between Tucker and Dickson at an early stage. Bullock's blood was found at various places: in a trail some 50 yards along the street where the fight took place (TR 487); on the cars he tried to start to get away from the fight between Tucker and Dickson (TR 481); on his blood-soaked shirt (TR 415, 978); and on the boat at the lake where Dickson's body was later hidden. (TR 1015, 1476) None of Bullock's blood was found on the concrete block with which Tucker killed Dickson, or on Dickson's body. (TR 966-85, 1474-86)

After Tucker killed Dickson, Tucker and Bullock jointly disposed of the body. Bullock testified that he did so out of fear of Tucker, and because he was shocked and confused about what had happened. (TR 1112-13, 1126)

Bullock was arrested two days later on his way back from the hospital where he had received additional treatment for the injury to his hand (he had had it stitched the night of the incident (TR 1127)). (TR 1130-31) He was held at the police station for over nine hours, after which time he made a statement. (TR 592, 599) No lawyer was present.

C. The Indictment and Trial

Bullock was indicted, tried, convicted and sentenced to death on the theory that he aided and abetted in a robbery in the course of which the victim was killed by someone else (in this case, Tucker).[12] He was indicted under the Mississippi

12 As Judge Garwood wrote, concurring in the decision below:

> [I]t appears that the entire case was essentially tried on the theory, in full accordance with the then law of Mississippi, that it was not necessary, either for the felony murder conviction or for the sentence

(Footnote continued on following page)

capital felony murder statute, Miss. Code Ann. § 97-3-19(2)(e) (since amended), which provided:

> (2) The killing of a human being without the authority of law by any means or in any manner shall be capital murder in the following cases:
>
> . . . .
>
> (e) When done *with or without any design to effect death, by any person* engaged in the commission of the crime of rape, burglary, kidnapping, arson or robbery, or in any attempt to commit such felonies;

(1a-2a) (emphasis added).[13] Consistent with the statute, Bullock's indictment made no reference to malice aforethought or intent to kill. (TR 2)[14]

Bullock and Tucker were tried separately and were represented by different counsel. Bullock's prosecution was based on the theory that he aided and abetted Tucker in the robbery of Dickson. The prosecution repeatedly objected to any suggestion that the state had to prove that Bullock killed Dickson. Thus, during the jury selection, when Bullock's attorney stated:

> [t]his charge being capital murder, the State has to prove to you beyond a reasonable doubt that Crawford Bullock, Jr. was in the process—he either did rob or was attempt-

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(Footnote continued from previous page)

> to death, to find that Bullock had either the intent to kill or any personal participation in the killing. It is not unreasonable to infer that Bullock's jury may have reached the result it did despite concluding both that Bullock had no design to effect death and that the affray reached the level of being potentially fatal to Dickson only well after Bullock had backed away and ceased any personal participation in it.

Bullock v. Lucas, 743 F.2d 244, 248 (5th Cir. 1984) (Garwood, J., concurring) (A 19).

13 Under Mississippi law, any person aiding and abetting in the underlying felony can be found guilty of capital felony murder. *See, e.g., Reddix v. State*, 381 So. 2d 999, 1012 (Miss.), *cert. denied*, 449 U.S. 986 (1980); *Price v. State*, 362 So. 2d 204, 205 (Miss. 1978).

14 The state's proposed jury instruction on murder as a lesser included offense was rejected by the trial court precisely because no malice aforethought was alleged in the indictment. (TR 1243-45)

> ing to rob Mark Dickson—and that in doing so, he killed Mark Dickson,

the prosecutor objected:

> To which we object, Your Honor. That's not a proper statement of the law.

(TR 333)[15] And, during closing argument, the following exchange took place:

> [Defense counsel]: All you've got to do [to acquit] is not to be able to prove that he killed him or that he robbed him.
>
> [Prosecutor]: May it please the Court, that's exactly the reason I objected to that instruction and I object to him stating that to the jury. *We do not have to prove that he killed this man or robbed him. All we have to show is that he aided or abetted* and we object to that.
>
> [The Court]: You will have an opportunity to argue, Mr. Peters [the prosecutor]. . . .

(TR 1310) (emphasis added).

In accordance with the indictment, the capital felony murder statute, and the state's theory of the case, the jury instructions did not require the jury to find that Bullock killed, attempted to kill, intended to kill, or contemplated that lethal force would be used.[16]

---

15 The court responded by reminding the jury that it would be instructed on the law at the end of the trial. (TR 333)

16 The jury instructions on capital murder were Instructions 15 and 16, delivered during the guilt phase of the trial. Instruction 15, in its entirety, read:

> The Court instructs the Jury that if you believe from the evidence in this case, beyond a reasonable doubt that on September 21, 1978, in the First Judicial District of Hinds County, Mississippi, Crawford Bullock, Jr., was present, consented to, and encouraged the commission of a crime and thereby aided another individual, and that he, the said Crawford Bullock, Jr. or the other, then and there did wilfully, unlawfully and feloniously take and carry away the personal property of another from the presence of Mark Dickson, and from his person,

(Footnote continued on following page)

The trial commenced on Tuesday, May 22, 1979. The guilt phase of the trial was concluded 8:10 p.m. on Friday, May 25, 1979, when the jury returned a verdict of guilty. (TR 149, 1435,

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(Footnote continued from previous page)

> against his will, by violence to his person, to-wit his billfold or one 1976 Thunderbird automobile then in his possession, then and in that event, the Defendant, Crawford Bullock, Jr., is guilty of robbery as if he had with his own hands committed the whole offense; and, if the Jury further finds from the evidence in this case, beyond a reasonable doubt, that on said date aforesaid, while engaged in the commission of the aforesaid robbery, if any, that the said Crawford Bullock, Jr., did alone, or *while acting in concert with another*, while present at said time and place by consenting to the killing of the said Mark Dickson, and that the said Crawford Bullock, Jr., did any overt act which was immediately connected with or leading to its commission, without authority of law, and not in necessary self defense, by any means, in any manner, *whether done with or without any design to effect the death* of the said Mark Dickson, that then, and in that event, the said Crawford Bullock, Jr., is guilty of capital murder, and the form of your verdict should be in the following form, written on a separate sheet of paper:
>
> "We, the Jury, find the Defendant, Crawford Bullock, Jr., guilty of Capital Murder."

(TR 1418-19; JA 87-89) (emphasis added) Instruction 16, in its entirety, read:

> The Court instructs the Jury that in order to find the Defendant guilty of capital murder you must be convinced beyond a reasonable doubt from the evidence that the Defendant is guilty of each of the following:
>
> 1. That Crawford Bullock, Jr. did feloniously take or attempt to feloniously take the personal property of Mark Dickson, in his presence or from his person and against his will by violence to his person or by putting Mark Dickson in fear of some immediate injury to his person and
>
> 2. That in doing so, Crawford Bullock, Jr., did in fact kill Mark Dickson *without malice*, without authority of law, and not in necessary self defense.
>
> The Court further instructs you that if the State fails to prove to you any one of the above, beyond a reasonable doubt, then it is your sworn duty to find the Defendant, "Not Guilty."

(TR 1420; JA 90-91) (emphasis added) These instructions did not require the jury to find that Bullock killed, attempted to kill, intended to kill, or contemplated the use of lethal force. *See infra* at 33-36.

The instructions given to the jury at the sentencing phase (TR 1424-34; JA 97-112) contained no language whatsoever requiring the jury to find that Bullock killed, attempted to kill, intended to kill, or contemplated that lethal force would be used.

1488) Bullock's attorney requested a recess until the next morning so that he could properly prepare for the sentencing phase, but the trial judge refused. (TR 1337-38) As a result, at least one of the witnesses the defense had planned to call was unavailable. (HC 56)[17] The entire sentencing phase took only about one hour (TR 1488-89), after which the jury deliberated for approximately two hours before returning a verdict of death at about 11:40 p.m. (TR 1377-78, 1489) The jury found two aggravating circumstances,[18] and found that the mitigating circumstances did not outweigh the aggravating circumstances. (TR 1377-78, 1436) It is not clear which mitigating circumstances the jury may have found, as the verdict form did not include any space for these to be listed. (TR 1426)

Tucker, who did not plead guilty, was tried separately and was also convicted of capital felony murder, but was sentenced to life imprisonment. (HC 135-36)

D. Appellate Proceedings

On direct appeal, the Mississippi Supreme Court affirmed Bullock's conviction and death sentence. In affirming the sentence, the court expressly relied on accomplice liability consistent with the theory of the statute, the indictment, the prosecution and the jury instructions:

> The law is well settled in this state that any person who is present, aiding and abetting another in the commission of a crime, is equally guilty with the principal offender.

Bullock v. State, 391 So. 2d 601, 614 (Miss. 1980) (citations omitted) (A 116).

This Court denied Bullock's petition for a writ of certiorari. *Bullock v. Mississippi*, 452 U.S. 931 (1981).

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17 Even though it denied habeas corpus relief, the district court stated: "I would be more comfortable if [the trial judge] had waited and started that [sentencing] phase the next morning though." The state agreed, although it argued that no prejudice resulted. (HC 244)

18 (1) That the capital murder was committed while the defendant, either alone or with another, was engaged in the commission of robbery; and (2) that the capital murder was especially heinous, atrocious or cruel. (TR 1377, 1436)

E. Collateral Review

Bullock commenced state and federal collateral proceedings. The Mississippi Supreme Court denied Bullock leave to file a writ of error *coram nobis*, without opinion. By agreement of the parties, the federal habeas corpus proceeding was heard by a Magistrate, who denied the writ, but issued a certificate of probable cause authorizing appeal. *See* Order and Judgment dated September 14, 1983.

The Court of Appeals for the Fifth Circuit vacated Bullock's death sentence on the basis of this Court's decision in *Enmund*:

> [T]he instructions to the jury permitted the death sentence without a specific finding that Bullock either killed, attempted to kill or intended a killing or the use of lethal force.

Bullock v. Lucas, 743 F.2d 240, 247 (5th Cir. 1984) (A 12-13). The conviction, which Bullock did not challenge, was left undisturbed.

This Court granted the state's petition for a writ of certiorari. *Cabana v. Bullock*, 105 S. Ct. 2110 (1985).

SUMMARY OF THE ARGUMENT

In *Enmund v. Florida*, 458 U.S. 782 (1982), this Court held that the Eighth and Fourteenth Amendments prohibit the imposition of a death sentence on a person who did not kill, attempt to kill, intend to kill, or contemplate that lethal force would be used. This case raises the question—not addressed in *Enmund*—of who must make the findings required by *Enmund* before the death sentence may be imposed. (Point I)

As a matter of due process, the *Enmund* findings must be made by the jury. (Point II) The *Enmund* findings are constitutionally required elements of a death sentence for felony murder—they distinguish those individuals convicted of felony murder who are "death eligible" from those who are not. Consequently, due process requires that the *Enmund* findings must be made by the jury, just as it requires that all elements of

a crime must be found by the jury. Since elements of a crime specified by state law must be found by the jury, *a fortiori*, elements required by the Constitution—such as the *Enmund* factors—must be found by the jury. (Point IIA)

Even if due process did not universally require the *Enmund* findings to be made by the jury, it would require them to be made by the jury in those states, like Mississippi, where state law requires that all capital sentencing findings must be made by the jury. This feature of Mississippi law creates a constitutionally protected liberty interest as a result of which defendants tried for capital murder in Mississippi, including Bullock, have a due process right to have the *Enmund* findings made by the jury. (Point IIB)

Bullock's jury was not required to make any *Enmund* findings. *Francis v. Franklin*, 105 S. Ct. 1965 (1985), and an unbroken line of precedent establish that the instructions given to Bullock's jury were fatally defective. Indeed, petitioners do not argue to the contrary. Consequently, Bullock's death sentence was properly vacated. (Point IIC)

Petitioners' argument that the *Enmund* findings can be made by a state appellate court because *Enmund* was a proportionality decision fundamentally confuses the role of this Court in interpreting the Eighth Amendment with the role of the jury in making factual findings in a specific case. This Court determines which crimes may constitutionally be punished by death; a jury determines whether a particular defendant committed one of those crimes. Petitioners' assertion that in making *Enmund* findings a state appellate court would be doing no more than this Court did in *Enmund* is obviously erroneous, as this Court made no factual findings in *Enmund*. A state appellate court making *Enmund* findings in the first instance would be impermissibly attempting to supply constitutionally required findings that the jury had not made. Far from sanctioning such a procedure in *Enmund*, this Court has consistently held that due process is violated when an appellate court attempts to provide findings omitted by the jury. (Point IID)

Assuming *arguendo* that due process does not require the jury to make the *Enmund* findings, at the very least it requires that those findings be made at the trial level; they cannot be supplied by an appellate court. Since neither Bullock's jury nor his trial judge made any *Enmund* findings at either the guilt or sentencing phase, his death sentence was properly vacated even if the *Enmund* findings could be made by either the jury or trial judge. (Point III)

Moreover, even if petitioners were correct in asserting that the *Enmund* findings could be supplied by a state appellate court, the judgment below should nevertheless be affirmed. The opinion of the Mississippi Supreme Court cannot be construed as containing any *Enmund* findings. That court did not consider itself to be making *Enmund* findings (its decision predated *Enmund*), and its statement of the case and discussion do not contain any unambiguous findings of any of the *Enmund* factors. Rather, consistent with the indictment, the Mississippi felony murder statute, the prosecution and the jury instructions, the Mississippi Supreme Court's analysis rests squarely on the theory of accomplice liability which *Enmund* holds cannot constitutionally support a death sentence. (Point IV)

ARGUMENT

I

ENMUND v. FLORIDA PROHIBITS THE IMPOSITION OF A DEATH SENTENCE ON AN INDIVIDUAL WHO DID NOT KILL, ATTEMPT TO KILL, INTEND TO KILL, OR CONTEMPLATE THAT LETHAL FORCE WOULD BE USED.

In *Enmund v. Florida*, 458 U.S. 782 (1982), this Court held that the Eighth and Fourteenth Amendments prohibit the execution of an individual who did not kill, attempt to kill, intend to kill, or contemplate that lethal force would be used.[19]

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19 *Enmund* did not hold that any one of these elements alone is sufficient to support a death sentence; rather, it held that where none is present the death penalty is unconstitutional. Because Bullock's jury did not make any of the *Enmund* findings, the Court need not decide whether any particular factor is necessary or whether each is sufficient.

Enmund was the getaway car driver in a robbery during which other persons committed murder. The Court held that the Eighth Amendment required that

> [f]or the purposes of imposing the death penalty, Enmund's criminal culpability must be limited to his participation in the robbery, and his punishment must be tailored to his personal responsibility and moral guilt.

Id. at 801.

In reaching this conclusion, the Court noted that legislatures and jurors had regularly rejected the imposition of the death penalty on individuals who had not killed, attempted to kill, intended to kill, or contemplated the use of lethal force. *Id.* at 789-96. Specifically, the Court noted that only eight states allowed the imposition of the death penalty "solely because the defendant somehow participated in a robbery in the course of which a murder was committed." *Id.* at 792.[20] One of the eight was Mississippi; presaging this case, the Court singled out the statute under which Bullock was sentenced to death as one authorizing an unconstitutional death sentence. *Id.* at 789 n.5.[21]

This case presents the question of who must find that at least one of the *Enmund* factors is present before the death penalty may be imposed.[22] Because of the procedural posture in which

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20 The Court identified another nine states where there was some possibility of a defendant being sentenced to death without a finding that he killed, attempted to kill, intended to kill or contemplated the use of lethal force. *Id.* at 791-92 & nn.12-13.

21 Since the 1982 decision in *Enmund*, several of the 17 states that conceivably allowed death sentences in violation of *Enmund*, including Mississippi, have corrected the constitutional deficiencies in their capital sentencing schemes by statutory amendment or judicial decision requiring that *Enmund* findings be made before the death sentence can be imposed. *See infra* at 23-27.

22 Although petitioners previously argued that *Enmund* simply set forth a geographic proximity test—*i.e.*, that it barred the death penalty only where the defendant was not physically present at the scene of the murder—they have now abandoned that argument. In any event, it is clear that *Enmund* does more than simply announce a "tape measure" rule barring the

(Footnote continued on following page)

Enmund came before the Court, the issue of who must make the required findings was not addressed there.[23] In *Enmund*, the Florida Supreme Court reversed factual findings as to Enmund's personal involvement that had been made by the trial court, and held that Enmund had not killed, attempted to kill, intended to kill, or contemplated that lethal force would be used. Consequently, this Court was not faced with—and did not address—the question of who must find that the *Enmund* factors are present to allow imposition of the death sentence.

Respondent contends that the *Enmund* findings must be made by the jury. Petitioners argue that the *Enmund* findings can be made by a state appellate court reviewing the trial record.[24] Petitioners do not argue that the *Enmund* findings can be supplied by a federal court on collateral review.

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death penalty only when the defendant was more than a certain distance from the scene of the crime. Also abandoned by petitioners is their argument that *Enmund* should not be applied retroactively. That argument is also without merit. *See Jones v. Thigpen*, 741 F.2d 805, 810-11 (5th Cir. 1984), *petition for certiorari pending* (describing state's argument that *Enmund* applies only prospectively as "patent[ly] frivolous[ ]"); *see also Eberheart v. Georgia*, 433 U.S. 917 (1977); *Stewart v. Massachusetts*, 408 U.S. 845 (1972) (per curiam).

23 Petitioners' claim that *Enmund* supports their position (Pet. Brief at 54) is unfounded. *Enmund* simply does not address the question of who must make the required findings before the death penalty may be imposed.

24 There is a split in the circuits, with the Fifth Circuit supporting respondent's position and the Eleventh Circuit supporting petitioners'. *Compare, e.g., Reddix v. Thigpen*, 728 F.2d 705 (5th Cir.), *cert. denied*, 105 S. Ct. 397 (1984) *with, e.g., Ross v. Kemp*, 756 F.2d 1483 (11th Cir. 1985) (en banc). The other circuits have not clearly expressed a view on this question, although the Tenth Circuit appears to have followed the Fifth Circuit's approach in *Chaney v. Brown*, 730 F.2d 1334, 1356 n.29 (10th Cir.), *cert. denied*, 105 S. Ct. 601 (1984) (death penalty vacated on other grounds; in addressing the *Enmund* challenge the court stated: "In any further sentencing proceedings, careful *jury instructions* must explain the essential elements required by *Enmund* before a death sentence can be imposed." (emphasis added)) and the Fourth Circuit may have followed the Eleventh Circuit's approach in *Roach v. Martin*, 757 F.2d 1463, 1482-83 (4th Cir. 1985).

II

BULLOCK'S DEATH SENTENCE WAS PROPERLY VACATED BECAUSE HIS JURY WAS NOT REQUIRED TO MAKE ANY *ENMUND* FINDINGS.

A. Due Process Requires That The *Enmund* Findings Be Made By The Jury.[25,26]

It is a fundamental tenet of due process that a criminal defendant can be convicted only if a jury finds that he is guilty of all elements of the crime with which he has been charged. *Sandstrom v. Montana*, 442 U.S. 510, 520 (1979); *Mullaney v. Wilbur*, 421 U.S. 684 (1975). The requirement that all elements of a crime must be found by a jury is a result of the "fundamental" role of trial by jury in our criminal justice system. *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968).

> The guarantees of jury trial in the Federal and State Constitutions reflect a profound judgment about the way in which law should be enforced and justice administered. . . . The deep commitment of the Nation to the right of jury trial in serious criminal cases as a defense against arbitrary law enforcement qualifies for protection under

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25 Because there is a factual dispute about whether any of the *Enmund* factors are present in this case, the Court need not decide if there should be an exception to the requirement that the *Enmund* findings must be made by the jury in cases where such findings are "undisputed." *Francois v. Wainwright*, 105 S. Ct. 2668, 2669 (1985) (Brennan, J., dissenting from denial of certiorari). A number of the Eleventh Circuit's cases affirming death sentences where the jury did not make *Enmund* findings fall into the category of murders by a single defendant acting without an accomplice where it is undisputed that one or more of the *Enmund* factors were present. *See, e.g., Henry v. Wainwright*, 721 F.2d 990 (11th Cir. 1983), *cert. denied*, 104 S. Ct. 2374 (1984).

26 Since the *Enmund* findings have to be made by the jury, petitioners' second argument —that there was insufficient deference to the findings of the Mississippi Supreme Court—is irrelevant. Nothing in the Mississippi Supreme Court's opinion even remotely suggests that Bullock's jury made an *Enmund* finding. There is no state court finding on the relevant issue to which a federal court should defer.

> the Due Process Clause of the Fourteenth Amendment, and must therefore be respected by the States.

Id. at 155-56. It is for this reason that "a judge may not direct a verdict of guilty no matter how conclusive the evidence." *United Brotherhood of Carpenters v. United States*, 330 U.S. 395, 408 (1947) (footnote omitted); *see also Sandstrom v. Montana*, 442 U.S. 510, 516 n.5 (1979); *Sparf v. United States*, 156 U.S. 51, 105-06 (1895).

Thus, due process requires that all elements of a crime must be found by the jury. Elements of a crime are defined by state law. In contrast, the *Enmund* findings are *constitutionally* required components of a crime for which a person may be executed. Consequently, the *Enmund* findings have a constitutional significance at least equivalent to statutory elements of the crime of capital felony murder. Since due process mandates that elements of the crime required by state law must be found by the jury, *a fortiori*, the constitutionally required *Enmund* factors must be found by the jury.

The status of the *Enmund* findings as at least the constitutional equivalent of elements of an offense is apparent from a comparison of their role in the capital sentencing process to the role of aggravating or mitigating circumstances. The Eighth Amendment places constitutional limits on which crimes may be punished by death. It is up to the states to devise a statutory scheme that guides the sentencer's discretion in determining who among the constitutionally "death eligible" defendants will actually be sentenced to death.[27] This channeling function is primarily accomplished by the consideration of aggravating and mitigating circumstances defined by state law. The purpose of statutory aggravating and mitigating circumstances is to "guide[ ] and channel[ ]" the sentencer in exercising its discretion in choosing who among those eligible for the death

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27 This Court has struck down both statutes allowing the sentencer unbridled discretion in sentencing defendants to death, *see, e.g., Furman v. Georgia*, 408 U.S. 238 (1972) (per curiam), and mandatory death penalty statutes. *See, e.g., Woodson v. North Carolina*, 428 U.S. 280 (1976) (plurality opinion); *Roberts v. Louisiana*, 431 U.S. 633 (1977) (per curiam).

sentence will actually be sentenced to death, *Proffitt v. Florida*, 428 U.S. 242, 258 (1976) (Stewart, Powell and Stevens, JJ.), or to "genuinely narrow the class of persons eligible for the death penalty and . . . [to] justify the imposition of a more severe penalty on the defendant compared to others found guilty of murder." *Zant v. Stephens*, 462 U.S. 862, 877 (1983) (footnote omitted); *see also Spaziano v. Florida*, 104 S. Ct. 3154, 3162-63 (1984); *Barclay v. Florida*, 463 U.S. 939, 962-63 (1983) (Stevens and Powell, JJ., concurring); *Godfrey v. Georgia*, 446 U.S. 420, 428 (1980) (plurality opinion); *Gregg v. Georgia*, 428 U.S. 153, 221-22 (1976) (White, J., Burger, C.J. and Rehnquist, J., concurring).

Because the purpose of weighing aggravating and mitigating circumstances is to select among those for whom the death penalty is a constitutionally permissible punishment, this Court has not accorded constitutional significance to particular aggravating or mitigating circumstances. Thus, no particular aggravating circumstances are constitutionally required before the death penalty may be imposed, no particular mitigating circumstances preclude its imposition, and reliance, in part, on non-statutory aggravating circumstances does not invalidate a death sentence. *See Barclay v. Florida*, 463 U.S. 939 (1983); *Zant v. Stephens*, 462 U.S. 862 (1983). As the Court stated in *California v. Ramos*, 463 U.S. 992 (1983):

> In ensuring that the death penalty is not meted out arbitrarily or capriciously, the Court's principal concern has been more with the *procedure* by which the State imposes the death sentence than with the substantive factors the State lays before the jury as a basis for imposing death, once it has been determined that the defendant falls within the category of persons eligible for the death penalty.

Id. at 999 (emphasis in original); *cf. Zant v. Stephens*, 462 U.S. 862, 890 (1983) ("the Constitution does not require a State to adopt specific standards for instructing the jury in its consideration of aggravating and mitigating circumstances").

Consequently, aggravating and mitigating circumstances may generally be found by the trial court as well as the jury. *Spaziano v. Florida*, 104 S. Ct. 3154 (1984).

By contrast, the *Enmund* factors are constitutionally required before the death penalty may be considered as a sentence to be imposed. They are not used to further narrow the class of defendants for whom death is a permissible punishment, nor are they guides to help the sentencer exercise its discretion. Rather, the *Enmund* factors come in at an earlier stage of the analysis: they define which crimes can—and which cannot—constitutionally be punished by death; they determine "death eligibility," rather than simply aiding in the choice of which of the "death eligible" defendants will be executed. Particular aggravating and mitigating circumstances are not constitutionally required; the *Enmund* factors are. As a result of *Enmund*, certain "crimes formerly punishable by death no longer are or can be." *Tennessee v. Garner*, 105 S. Ct. 1694, 1703 (1985).

Coker v. Georgia, 433 U.S. 584 (1977) (plurality opinion), held that the death penalty may not be constitutionally imposed on a defendant for the crime of rape. Similarly, *Enmund* held that the death penalty may not constitutionally be imposed on a defendant who did not kill, attempt to kill, intend to kill, or contemplate the use of lethal force. It is beyond dispute that only a jury can find that an individual committed murder rather than rape. *See Cole v. Arkansas*, 333 U.S. 196 (1948) (violation of due process for appellate court to affirm prison sentence based on finding that defendant committed a crime the jury had not convicted him of); *Presnell v. Georgia*, 439 U.S. 14 (1978) (per curiam) (violation of due process for appellate court to affirm death penalty based on finding of an aggravating circumstance that had not been found by the jury). So too, only a jury can find that an individual committed the type of felony murder for which death is a constitutionally valid punishment (*i.e.*, one where the *Enmund* factors are present), rather than a felony murder for which the death

penalty may not be imposed under *Enmund*.[28] *Cf. Coker v. Georgia*, 433 U.S. 584, 602 n.1 (1977) (Powell, J., concurring in part and dissenting in part) (arguing that the death penalty should be available for certain forms of aggravated rape, with the jury to make the determination of which form of rape the defendant is guilty of: "the jury system is designed and operates successfully to resolve precisely this type of factual issue").

This Court's decision in *Mullaney v. Wilbur*, 421 U.S. 684 (1975), further supports the conclusion that the *Enmund* factors are constitutionally equivalent to elements of an offense for purposes of the due process requirement that all elements of an offense must be found by the jury. In *Mullaney*, the state argued that elements of the crime which must be found by the jury included only "those facts which, if not proved, would wholly exonerate the defendant." *Id.* at 697. The Court rejected that argument.

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28 This conclusion is especially compelling given the death penalty's unique nature, which has been consistently recognized by this Court:

> [E]very Member of this Court has written or joined at least one opinion endorsing the proposition that because of its severity and irrevocability, the death penalty is qualitatively different from any other punishment, and hence must be accompanied by unique safeguards to ensure that it is a justified response to a given offense.

Spaziano v. Florida, 104 S. Ct. 3154, 3167 & n.2 (1984) (Stevens, Brennan and Marshall, JJ., concurring in part and dissenting in part) (collecting cases); *see also California v. Ramos*, 463 U.S. 992, 998-99 & n.9 (1983) (collecting cases). If only a jury can determine which of the varying degrees of robbery or non-capital murder a defendant is guilty of, where the only difference is the length of the prison term, *a fortiori*, only the jury can determine whether the defendant is guilty of capital felony murder or non-capital felony murder under *Enmund*, where the difference is death versus a prison term.

> This conclusion rests squarely on the predicate that the penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.

Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (plurality opinion) (footnote omitted).

> This analysis fails to recognize that the criminal law of Maine, like that of other jurisdictions, is concerned not only with guilt or innocence in the abstract but also with the degree of criminal culpability. . . .
>
> The safeguards of due process are not rendered unavailing simply because a determination may already have been reached that would stigmatize the defendant and that might lead to a significant impairment of personal liberty. The fact remains that the consequences resulting from a verdict of murder, as compared with a verdict of manslaughter, differ significantly. Indeed, when viewed in terms of the potential difference in restrictions of personal liberty attendant to each conviction, the distinction established by Maine between murder and manslaughter may be of greater importance than the difference between guilt or innocence for many lesser crimes.

Id. at 697-98.

Similarly, the *Enmund* findings distinguish between those who are subject to the death penalty and those who are subject only to lesser penalties. This distinction "may be of greater importance than the difference between guilt or innocence for many lesser crimes," *Mullaney*, 421 U.S. at 698, for "[d]eath, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two." *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (plurality opinion). Consequently, due process requires that the *Enmund* findings be made by the jury.

Since *Enmund*, several of the states that did not previously require *Enmund* findings before imposing the death sentence have corrected the constitutional defects in their capital sentencing schemes. In 1983, Mississippi added a provision to its capital sentencing statute explicitly requiring an *Enmund* finding by the jury before the death penalty may be imposed. Miss. Code Ann. § 99-19-101(7) (Cum. Supp. 1984).[29] Bullock is a

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29 The 1983 amendment to the Mississippi capital sentencing statute added the following language:

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victim of the fact that his trial occurred during the narrow window of unconstitutionality in the Mississippi capital sentencing scheme. If Bullock were sentenced today, he would not be subject to the statute that authorized his execution in violation of *Enmund*.

Other states have corrected the constitutional defects in their capital sentencing schemes by judicial action. In *State v. Stokes*, 308 N. Car. 634, 304 S.E.2d 184 (1983), the North Carolina Supreme Court reversed a death penalty because the jury had not made any of the *Enmund* findings, even though "there was strong evidence that defendant himself . . . delivered the fatal blows." *Id.* at 649, 304 S.E.2d at 194. The court set forth new procedures that are "necessary when the *Enmund* question is presented":

> [A]t the . . . sentencing hearing and before the sentencing jury begins its consideration of aggravating and mitigating circumstances toward returning its recommendation as to punishment, the trial judge should submit to and the jury answer issues as follows:

(Footnote continued from previous page)

> (7) In order to return and impose a sentence of death *the jury must* make a written finding of one or more of the following:
>
> (a) The defendant actually killed;
>
> (b) The defendant attempted to kill;
>
> (c) The defendant intended that a killing take place;
>
> (d) The defendant contemplated that lethal force would be employed.

Miss. Code Ann. § 99-19-101(7) (Cum. Supp. 1984) (8a) (emphasis added).

Petitioners' statement that the new provision explicitly requiring the jury to make *Enmund* findings is only a "recommended procedure" (Pet. Brief at 77) is puzzling. The statute is phrased in mandatory terms, and the case cited by petitioners to support their statement, *Newell v. State*, 308 So. 2d 71 (Miss. 1975), is not a capital case and predates both *Enmund* and the amendment to § 99-19-101. (The other two cases cited by petitioners, *Cabello v. State*, No. 55, 581, ___ So. 2d ___ (Miss. May 1, 1985); *Johnson v. State*, No. 55, 265, ___ So. 2d ___ (Miss. May 8, 1985), also do not discuss the amended statute and at most suggest that it is not being applied retroactively by the Mississippi Supreme Court, not that its procedures are only "recommended.")

> 1. Did defendant deliver the fatal blows which caused the victim's death?
>
> 2. If not, did defendant, while acting as an aider and abettor, attempt to kill, intend to kill, or contemplate that life would be taken during the commission of the felony?
>
> . . . .
>
> If the jury should answer either of the above-stated questions "yes", then the jury would proceed to hear competent evidence concerning the aggravating and mitigating circumstances and return its recommendation as to whether defendant's punishment should be imprisonment for life or the death sentence. However, if the jury should answer both issues "no", it would return a recommendation of life imprisonment.

Id. at 651-52, 304 S.E.2d at 195.[30]

Similarly, in *Allen v. State*, 253 Ga. 390, 321 S.E.2d 710 (1984), *cert. denied*, 105 S. Ct. 1774 (1985), the Georgia Supreme Court described a procedure for the lower courts to follow to comply with the requirements of *Enmund*:

> [R]esolution of an *Enmund* issue is not facilitated by the practice of allowing a general verdict of guilty in a case in which both malice murder and felony murder are charged to the jury. Requiring the jury to specify whether the defendant is guilty of malice murder or of felony murder would clarify the jury's findings in this respect. Therefore, we suggest that in such a case the jury be instructed on three possible verdicts (guilty of malice murder, guilty

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30 The court further explained that

> [j]udicial economy requires that when first-degree murder is submitted to the jury on more than one theory at the guilt-innocence phase of the trial, the trial judge should submit the issues so as to require the jury to indicate the theory upon which their verdict is returned. This requirement would, in many instances, obviate the necessity of considering the *Enmund* holding at the sentencing phase of a trial.

Id. at 651, 304 S.E.2d at 195 n.1 (citation omitted).

> of felony murder or not guilty) instead of the usual two (guilty or not guilty).

253 Ga. at 395 n.3, 321 S.E.2d at 715 n.3;[31] *but see Stevens v. Kemp*, 254 Ga. 228, 327 S.E.2d 185 (1985) (apparently sustaining death sentence based on evidence in the record).

The California Supreme Court has required that the jury find intent to kill before a death sentence can be imposed. *See People v. Garcia*, 36 Cal. 3d 539, 684 P.2d 826, 205 Cal. Rptr. 265 (1984), *cert. denied*, 105 S. Ct. 1229 (1985); *Carlos v. Superior Court*, 35 Cal. 3d 131, 672 P.2d 862, 197 Cal. Rptr. 79 (1983).

The Oklahoma Supreme Court also apparently requires *Enmund* findings by the jury before the death penalty may be imposed. In *Hatch v. Oklahoma*, 662 P.2d 1377 (Okla. Crim. 1983), the Court remanded a case for resentencing "in light of *Enmund*" so that the sentencer[32] could "give greater attention to the evidence concerning . . . Hatch's individual participation and intent in the events which culminated in the murder/shootings." *Id.* at 1383.[33]

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31 In light of *Allen*, Georgia's appearance as an *amicus* in this case is puzzling. The Supreme Court of Georgia has already taken steps to ensure compliance by that state's courts with the due process requirement that the *Enmund* findings be made by the jury.

32 Although the remand in *Hatch* was to the trial court, that was because Hatch waived his right to a jury, and was sentenced by the judge. *Id.* at 1379. Since capital sentencing decisions in Oklahoma are made by a jury absent such a waiver, Okla. Stat., Tit. 21, § 701.11 (1983), presumably the Oklahoma Supreme Court would ordinarily require the *Enmund* findings to be made by the jury.

33 In Arizona, the state supreme court has interpreted *Enmund* as requiring the trial judge—who makes the sentencing decision under Arizona law—to make an *Enmund* finding before imposing the death penalty. *See State v. McDaniel*, 136 Ariz. 188, 665 P.2d 70 (1983):

> In order to comply with *Enmund*, therefore, we believe that in future cases where the jury might have found the defendant guilty of first degree murder based on a felony-murder theory, the trial judge must determine beyond a reasonable doubt prior to imposing a sentence of death that the defendant killed, attempted to kill or intended to kill.

Id. at 81, 665 P.2d at 81.

In all, of the 17 states identified in *Enmund* as potentially authorizing unconstitutional death penalties, six have taken steps to require *Enmund*

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These actions by state courts and legislatures refute petitioners' (and *amici curiae*'s) argument that requiring the jury to make the *Enmund* findings will impose an unreasonable burden on the states. Even before *Enmund*, most states, by their definitions of which crimes were capital, required that *Enmund*-type findings be made by the jury before the death penalty could be imposed. Plainly, such a procedure is not burdensome. Moreover, since *Enmund*, several of the states that did not already require the jury to make *Enmund* findings before a death penalty could be imposed—including Mississippi—have corrected their capital sentencing procedures to do so. The constitutionally mandated procedure is neither unworkable nor burdensome.[34]

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findings before a death sentence can be imposed (five require such findings by the jury: Mississippi, Georgia, North Carolina, California, and (presumably) Oklahoma; one by the trial judge: Arizona); six appear to have taken the position that evidence in the record is sufficient and that express *Enmund* findings by the judge or jury are not required (Indiana, Wyoming, Tennessee, South Carolina, Idaho and Florida, although Florida has on occasion remanded a case for a trial court finding of the *Enmund* factors, *see Brumbley v. State*, 453 So. 2d 381 (Fla. 1984)); and the remaining five have not yet addressed the issue of who must make the *Enmund* findings (Nevada, Nebraska, Montana, Connecticut and South Dakota; Connecticut and South Dakota do not have any individuals on death row. *See* NAACP Legal Defense and Educational Fund, *Death Row, U.S.A.* (August, 1985)).

Thus at most twelve—and perhaps as few as seven—states potentially allow imposition of the death penalty without a finding by the jury of the *Enmund* factors. The fact that the vast majority of the 37 states with capital punishment statutes require *Enmund* findings to be made by the jury before a death sentence may be imposed further supports the conclusion that that procedure is required by due process. *See, e.g., Duncan v. Louisiana*, 391 U.S. 145 (1968); *cf. Enmund v. Florida*, 458 U.S. 782 (1982); *Coker v. Georgia*, 433 U.S. 584 (1977) (plurality opinion).

34 Indeed, requiring the *Enmund* findings to be made by the jury should *reduce* the burden on the states by providing greater certainty in the capital sentencing process. If the jury has made *Enmund* findings under proper instructions, the role of an appellate court on an *Enmund* challenge on direct or collateral review would be limited to determining whether there was sufficient evidence to support the finding. Requiring explicit *Enmund* findings by the jury would also reduce the degree of federal court involve-

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Because the *Enmund* findings are constitutionally required elements of a death sentence for felony murder, they must be found by the jury under the established principle of due process that all elements of a crime must be found by the jury.

B. Because Mississippi State Law Required That All Capital Sentencing Findings Be Made By The Jury, Bullock Had A Due Process Right To Have The *Enmund* Findings Made By The Jury.

Even if due process did not universally require that *Enmund* findings be made by the jury, it would nevertheless require that they be made by the jury in those states where state law requires the jury to make capital sentencing findings.

The Mississippi statutes under which Bullock was tried and sentenced required the jury to make all findings at both the guilt and sentencing phases in capital cases. *See* Miss. Code Ann. § 99-19-101 (since amended) (2a); § 99-19-103 (Cum. Supp. 1984) (9a).[35] The role of the jury is so fundamental in the Mississippi capital sentencing scheme that even if the defendant pleads guilty to capital murder a jury will be empaneled solely for the purpose of determining the appropriate sentence. *See* Miss. Code Ann. § 99-19-101(1) (Cum. Supp. 1984) (3a). Relying on the provisions of Mississippi law placing the capital sentencing decision with the jury, this Court recently held that a prosecutor's statements to a Mississippi jury suggesting that the responsibility for the sentencing decision lay

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ment in the state capital sentencing process by narrowing the scope of *habeas* review.

Moreover, since in all states the jury already must make the determination of guilt, compliance with the rule that *Enmund* findings must be made by the jury would be administratively simple. In those few cases where the capital crime did not itself include *Enmund* factors, the jury could be asked to make supplementary *Enmund* findings at the guilt phase, at the sentencing phase, or at an interim phase.

35 As noted above, the 1983 amendments to the Mississippi capital sentencing statute made explicit the requirement that the *Enmund* findings must be made by the jury. *See supra* at 23-24.

elsewhere required reversal of a death sentence. *Caldwell v. Mississippi*, 105 S. Ct. 2633 (1985). *See also Hill v. State*, 432 So. 2d 427 (Miss.), *cert. denied*, 464 U.S. 977 (1983):

> In the usual case the jury merely determines guilt or innocence, and the circuit judge determines the sentence. In a capital murder case the jury also determines the sentence.
>
> Any argument by the state which distorts or minimizes this solemn obligation and responsibility of the jury is serious error. Every attorney knows the jury verdict is indeed the last word on a factual dispute. Neither the circuit judge nor this Court is authorized to set aside a jury verdict on conflicting evidence, or a disputed factual issue. Moreover, in a death penalty case a jury should never be given false comfort that any decision they make will, or can be, corrected.
>
> . . . .
>
> A prosecutor making this sort of argument is asking for a mistrial.

Id. at 439; *accord*, *Wiley v. State*, 449 So. 2d 756 (Miss. 1984); *Williams v. State*, 445 So. 2d 798 (Miss. 1984), *cert. denied*, 105 S. Ct. 803 (1985).[36]

Provisions of state law like Mississippi's capital sentencing statute create a constitutionally protected liberty interest such that deprivation of the procedures required by state law constitutes a denial of due process. *See, e.g., Hicks v. Oklahoma*, 447 U.S. 343 (1980); *Presnell v. Georgia*, 439 U.S. 14 (1978) (per curiam); *Greenholtz v. Inmates of Nebraska*, 442 U.S. 1

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36 As the Mississippi Supreme Court stated in *Williams*:

> The structure of the capital sentencing system enacted by our Legislature places the entire sentencing burden on the jury. No judge or other official within our system has the power to impose the sentence of death; only the jury.

445 So. 2d at 811. *See also Wiley*, 449 So. 2d at 462:

> Under our law the jury is the sole player in the judicial process who may vote to send an accused to die. . . . While a jury is not literally "the hangman," only they may supply the hangman's victims.

(1979); *cf. Bullington v. Missouri*, 451 U.S. 430 (1981). As the Court stated in *Vitek v. Jones*, 445 U.S. 480 (1980):

> We have repeatedly held that state statutes may create liberty interests that are entitled to the procedural protections of the Due Process Clause of the Fourteenth Amendment.

Id. at 488; *accord*, *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974) ("We think a person's liberty is equally protected, even when the liberty itself is a statutory creation of the State.").

This Court's decision in *Hicks v. Oklahoma*, 447 U.S. 343 (1980), establishes that the Mississippi capital sentencing statute gave Bullock a due process right to have the *Enmund* findings made by the jury. Under Oklahoma law, a convicted defendant has the right to have his punishment fixed by the jury. Okla. Stat., Tit. 22, § 926 (1971). Hicks' jury was instructed that if they found him guilty they were required to fix his punishment at 40 years imprisonment under the Oklahoma habitual offender statute. After Hicks' conviction, the mandatory sentencing provisions of that statute were struck down by the state court; therefore, Hicks' jury should have been given the option to fix his punishment at any term above 10 years. Rather than vacate Hicks' sentence and remand the case for resentencing, however, the Oklahoma Court of Criminal Appeals affirmed the sentence because it was "within the range of punishment that could have been imposed in any event." 447 U.S. at 345 & n.2 (citing *Hicks v. State*, No. F-77-751 (Mar. 8, 1979)).

This Court reversed, holding that the deprivation of Hicks' state law right to have the jury determine his sentence constituted a denial of due process. In so holding, the Court explicitly rejected the argument that all that was involved was an error of state law:

> It is argued that all that is involved in this case is the denial of a procedural right of exclusively state concern. Where, however, a State has provided for the imposition of criminal punishment in the discretion of the trial jury, it is not correct to say that the defendant's interest in the exercise of that discretion is merely a matter of state

> procedural law. The defendant in such a case has a substantial and legitimate expectation that he will be deprived of his liberty only to the extent determined by the jury in the exercise of its statutory discretion, and that liberty interest is one that the Fourteenth Amendment preserves against arbitrary deprivation by the State. In this case Oklahoma denied the petitioner the jury sentence to which he was entitled under state law, simply on the frail conjecture that a jury *might* have imposed a sentence equally as harsh as that mandated by the invalid habitual offender provision. Such an arbitrary disregard of the petitioner's right to liberty is a denial of due process of law.

447 U.S. at 346 (emphasis in original; citations and footnote omitted).

Bullock had a right under Mississippi law to have all findings necessary for imposition of the death penalty made by the jury. The *Enmund* factors are such findings; consequently, Bullock had a "substantial and legitimate expectation—that he [would] be deprived of his [life] only to the extent determined by the jury . . . and that liberty interest is one that the Fourteenth Amendment preserves against arbitrary deprivation by the State." 447 U.S. at 346. Moreover, Mississippi has not put forward even a "frail conjecture" to support the deprivation of Bullock's right to have the *Enmund* factors found by the jury—the state simply delayed for a brief period before amending its capital sentencing statute to conform with *Enmund*. "Such an arbitrary disregard of [Bullock's] right to liberty is a denial of due process of law." 447 U.S. at 346.

Similarly, in *Presnell*, the Court reversed a death sentence where the state appellate court had supplied a finding that was required to be made by the jury under Georgia law. 439 U.S. at 14-17.[37] As in *Hicks*, deprivation of the defendant's state law

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37 A comparison of *Presnell* with *Time, Inc. v. Firestone*, 424 U.S. 448 (1976), reinforces the conclusion that the capital sentencing procedures of Mississippi state law have due process implications. In *Time*, a civil libel action, the Court suggested that because Florida law did not require a finding of fault at the trial level, such a finding on appeal would have been

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right to have particular findings made by the jury violated due process.

This Court's decisions interpreting the due process requirement that all elements of a crime be found beyond a reasonable doubt by the jury further support the conclusion that Mississippi's capital sentencing provisions create a constitutionally protected liberty interest. Because Maine's homicide statutes made the absence of heat of passion an element of murder, due process required the state to prove that fact beyond a reasonable doubt. *Mullaney v. Wilbur*, 421 U.S. 684 (1975). In contrast, because New York state law made extreme emotional disturbance an affirmative defense reducing murder to manslaughter, the state could constitutionally require the defendant to establish this fact. *Patterson v. New York*, 432 U.S. 197 (1977). As the Court stated in *Patterson*: "The applicability of the reasonable-doubt standard . . . has always been dependent on how a State defines the offense that is charged in any given case. . . ." *Id.* at 211 n.12.[38]

As a result of the provisions of Mississippi law requiring that all capital sentencing findings must be made by the jury, a defendant tried for capital murder in Mississippi has a due process right to have the *Enmund* findings made by the jury before a death sentence may be imposed.

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acceptable as a matter of constitutional due process. 424 U.S. at 461-62. In contrast, in *Presnell*, where state law required the findings to be made by the jury, the Court held that those findings could not be supplied on appeal.

38 This Court has also frequently held that state law has due process consequences in the area of creating protected property interests. *See, e.g., Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982); *Bishop v. Wood*, 426 U.S. 341 (1976).

C. Bullock's Jury Was Not Required To Find That He Killed, Attempted To Kill, Intended To Kill, Or Contemplated The Use Of Lethal Force.

Bullock was indicted, tried, convicted and sentenced on the theory that he aided and abetted in a robbery in the course of which the victim was killed by someone else. Consequently, the jury instructions given at Bullock's trial did not require a finding that he killed, attempted to kill, intended to kill, or contemplated the use of lethal force.

Indeed, petitioners have abandoned any argument that the jury instructions complied with *Enmund*. In any event, it is clear that the instructions were defective. Instruction 15 only required the jury to find that Dickson was killed in the course of a robbery, whether by Bullock or by "another," and further stated that the jury could find Bullock guilty of capital murder if he aided in the robbery and if he "alone, or while acting in concert with another," "consent[ed] to the killing" and "did any overt act which was immediately connected with or leading to its commission . . . whether done with or without any design to effect the death of said Mark Dickson." (TR 1414; JA 88) Instruction 16 allowed a conviction even if the killing was done "without malice." (TR 1420; JA 90-91) Although there was partially contradictory language elsewhere in Instruction 16, nowhere were the erroneous instructions corrected.

This Court has recently reaffirmed that the use of ambiguous jury instructions which could be misinterpreted by a reasonable juror requires reversal. *Francis v. Franklin*, 105 S. Ct. 1965 (1985). In *Francis*, there were contradictory instructions on the presumption of intent, just as here there were contradictory instructions on the question of actually killing. As in *Francis*, the ambiguity is fatal.

> Even if a reasonable juror could have understood the prohibition of presuming "criminal intention" as applying to the element of intent, that instruction did no more than contradict the instruction in the immediately preceding sentence. A reasonable juror could easily have resolved the contradiction in the instruction by choosing to

> abide by the mandatory presumption and ignore the prohibition of presumption. Nothing in these specific sentences or in the charge as a whole makes clear to the jury that one of these contradictory instructions carries more weight than the other. *Language that merely contradicts and does not explain a constitutionally infirm instruction will not suffice to absolve the infirmity. A reviewing court has no way of knowing which of the two irreconcilable instructions the jurors applied in reaching their verdict.*

Id. at 1975 (emphasis added; footnote omitted).[39]

Francis is merely the latest in a long line of decisions in which this Court has held that jury instructions that are ambiguous on an essential element of the crime require reversal. *See, e.g., Bollenbach v. United States*, 326 U.S. 607 (1946).

> [W]e are asked to sustain the conviction on the assumption that the jury was properly guided. The Government contends that the court below failed to appreciate several factors in regard to the criticized charge. What reason is there for assuming that the jury did not also fail to appreciate these factors . . . ? *A conviction ought not to rest on an equivocal direction to the jury on a basic issue.*

Id. at 613 (emphasis added). *Accord, Sandstrom v. Montana*, 442 U.S. 510, 526 (1979) (emphasis in original) (conviction reversed: "even if a jury *could* have ignored the presumption and found defendant guilty because he acted knowingly, we cannot be certain that this is what they *did* do").

Moreover, this Court has consistently held that evidence in the record, or the view of the judge or an appellate court, is no substitute for a required jury finding, and does not cure ambiguous jury instructions.

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39 *Francis* explicitly rejected the "at least likely" test urged by the dissent in that case, under which a jury instruction would be held invalid "only when 'it is at least likely' " that a reasonable juror understood the instruction unconstitutionally. *Id.* at 1975 n.8 (quoting *id.* at 1985 (Rehnquist, J., dissenting)).

> A failure to charge correctly is not harmless, since the verdict might have resulted from the incorrect instruction. . . . No matter how clear the evidence, [the defendants] are entitled to have the jury instructed in accordance with the standards which Congress has prescribed. *To repeat, guilt is determined by the jury, not the court.*

United Brotherhood of Carpenters, 330 U.S. at 409-10 (emphasis added); *see also Bollenbach v. United States*, 326 U.S. 607 (1946):

> [T]he question is not whether guilt may be spelt out of a record, but whether guilt has been found by a jury according to the procedure and standards appropriate for criminal trials in the federal courts.
>
> . . . . In view of the place of importance that trial by jury has in our Bill of Rights, it is not to be supposed that Congress intended to substitute the belief of appellate judges in the guilt of an accused, however justifiably engendered by the dead record, for ascertainment of guilt by a jury under appropriate judicial guidance. . . .

Id. at 614-15; *accord*, *Morissette v. United States*, 342 U.S. 246 (1952):

> Where intent of the accused is an ingredient of the crime charged, its existence is a question of fact which must be submitted to the jury. . . . However clear the proof may be, or however incontrovertible may seem to the judge to be the inference of criminal intention, the question of intent can never be ruled as a question of law, but must always be submitted to the jury.

Id. at 274 (quoting *People v. Flack*, 125 N.Y. 324, 334, 26 N.E. 267, 270 (1891)); *see also Stevenson v. United States*, 162 U.S. 313, 323 (1896).

As in *Francis*, Bullock's jury "was left in a quandary" as to which instruction to follow. 105 S. Ct. at 1976. Consequently, the instructions were fatally defective. Bullock's jury was not required to make any of the *Enmund* findings. As the Fifth Circuit held in vacating his death sentence:

> Bullock contends that his death sentence is constitutionally infirm under *Enmund* because the instructions to the jury permitted the death sentence without a specific finding that Bullock either killed, attempted to kill, or intended a killing or the use of lethal force. Such was the argument proffered in [*Reddix v. Thigpen*, 728 F.2d 705 (5th Cir. 1984), *cert. denied*, 105 S. Ct. 397 (1984)]. We were persuaded in *Reddix*; we are likewise now so persuaded.

Bullock v. Lucas, 743 F.2d 244, 247 (5th Cir. 1984) (A 12-13).[40]

Bullock's death penalty "may not stand in light of the jury instruction[s] which would permit the imposition of the death penalty merely because Bullock participated in the robbery 'with or without any design to effect the death of . . . Mark Dickson.' " *Id.* at 248 (A 18).

D. Petitioners' Argument That The *Enmund* Findings Can Be Made By A State Appellate Court Confuses This Court's Role In Constitutional Adjudication With The Jury's Role As Trier Of Fact.

Petitioners argue that "[t]he individualized treatment envisage[d] by *Enmund* is *not* a factual question to be decided by a jury but is instead a question of proportionality to be decided by an appellate court." Pet. Brief at 67 (citing *Pulley v. Harris*, 104 S. Ct. 871 (1984), and *Solem v. Helm*, 463 U.S. 277 (1983)). But petitioners have confused this Court's role as interpreter of the Eighth Amendment's ban on cruel and unusual punishment with the jury's role as trier of fact in criminal cases.[41] There is no dispute that constitutional proportionality decisions are made by appellate courts, not juries.

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40 The danger that Bullock's jury interpreted the instructions improperly was heightened by the prosecutor's statements that the state did not have to prove that Bullock killed Dickson, but only that he aided and abetted in the robbery. *See supra* at 9-10.

41 *Amici curiae* make the same error in arguing for reversal. *See* Brief of *Amici Curiae* at 6-7.

However, once this Court has determined which crimes can constitutionally be punished by death (such as intentional murder) and which cannot (such as rape or felony murder where the defendant did not kill, attempt to kill, intend to kill or contemplate the use of lethal force), it remains for the jury to determine whether a particular defendant has committed a crime which makes him "death eligible."

> [T]he determination has been made by the highest tribunal in this country that an "*Enmund* type" defendant cannot under our Constitution be eligible for the death penalty. The determination of whether an accused is an "*Enmund* type" defendant is a question of fact. The determination is identical to that of a jury decision of whether an accused is guilty of murder, voluntary manslaughter or involuntary manslaughter.

Ross v. Kemp, 756 F.2d 1483, 1496 (11th Cir. 1985) (en banc) (Clark, J., concurring in part and dissenting in part).[42]

Clearly, an appellate court reviewing a case where the death penalty was imposed on a convicted rapist could not say that its review of the record convinced it that the defendant had committed murder and, therefore, that the death sentence could be affirmed. Similarly, an appellate court faced with a defendant convicted only of the kind of felony murder for which death is a disproportionate penalty cannot search the record and itself find the presence of an *Enmund* factor not found by the jury in order to allow imposition of the death penalty. *Cf. Cole v. Arkansas*, 333 U.S. 196 (1948) (violation of due process where state appellate court affirmed a prison sentence on the basis of a charge on which the defendant was not tried or convicted); *Presnell v. Georgia*, 439 U.S. 14 (1978) (per curiam) (violation of due process where state appellate

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42 Petitioners would reduce this Court's role to little more than expressing its agreement or disagreement—as a matter of sentencing discretion—with the imposition of the death sentence on a particular defendant. This Court has consistently declined such a role. *See, e.g., Spaziano v. Florida*, 104 S. Ct. 3154, 3166 (1984); *Barclay v. Florida*, 463 U.S. 939, 972 (1983) (Stevens and Powell, JJ., concurring).

court affirmed a death sentence on the basis of an aggravating circumstance not found by the jury).[43]

III

EVEN IF THE *ENMUND* FINDINGS NEED NOT BE MADE BY THE JURY, THEY MUST BE MADE AT THE TRIAL LEVEL, AND THEY WERE NOT IN THIS CASE.

Even if due process does not absolutely require the *Enmund* findings to be made by the jury, they must in any event be made at the trial level and cannot be supplied by an appellate court. Indeed, even if the *Enmund* findings were no more than aggravating or mitigating circumstances, they would still have to be made at the trial level rather than at the appellate level. The capital sentencing statutes approved by this Court have all given authority for imposing the death sentence to the jury or trial judge. *See, e.g., Gregg v. Georgia*, 428 U.S. 153 (1976); *Proffitt v. Florida*, 428 U.S. 242 (1976); *Jurek v. Texas*, 428 U.S. 262 (1976). The decisions of this Court, especially the decisions requiring the consideration of mitigating circumstances, *see, e.g., Eddings v. Oklahoma*, 455 U.S. 104 (1982); *Lockett v. Ohio*, 438 U.S. 586 (1978) (plurality opinion), establish that the findings giving rise to imposition of the death penalty must be made at the trial level, by someone who has actually seen the witnesses and heard the testimony. As the Court explained in reversing the death sentence in *Caldwell v. Mississippi*, 105 S. Ct. 2633 (1985):

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43 *Pulley v. Harris*, 104 S. Ct. 871 (1984) and *Solem v. Helm*, 463 U.S. 277 (1983), the cases principally relied upon by petitioners and *amici curiae*, are not to the contrary. *Pulley* held that the Eighth Amendment does not require comparative proportionality review in every capital case. It is irrelevant to the issue here. *Solem* held that the punishment imposed on Helm was disproportionate to the crime for which he had been convicted. The Court did not engage in its own fact finding; rather, it compared the penalty imposed on Helm to the crime of which he had been convicted. Nothing in *Solem* suggests that appellate courts can make factual findings that are constitutionally required before a particular sentence may be imposed. *Solem*, too, is irrelevant to this case.

> When we held that a defendant has a constitutional right to the consideration of such [mitigating] factors, we clearly envisioned that that consideration would occur among sentencers who were present to hear the evidence and arguments and see the witnesses.

Id. at 2640. If aggravating and mitigating circumstances can only be found at the trial level, *a fortiori*, the same is true for the *Enmund* findings which have a constitutional significance not enjoyed by simple aggravating and mitigating circumstances. *See supra* at 19-21.

This Court has already held that findings necessary for imposition of the death penalty must be made at the trial level and cannot be supplied on appeal.[44] In *Presnell v. Georgia*, 439 U.S. 14 (1978) (per curiam), the jury had imposed the death sentence after finding as one of the aggravating circumstances that the murder was committed while Presnell was engaged in the commission of "kidnapping with bodily harm, aggravated sodomy." On appeal, the Georgia Supreme Court held that the state could not rely on sodomy as the bodily injury associated with kidnapping, and further held that the jury had not properly convicted Presnell of forcible rape. However, it affirmed the death sentence "on the theory that, despite the lack of a jury finding of forcible rape, evidence in the record

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44 Indeed, if petitioners were correct that the *Enmund* findings could be made by an appellate court, the sentencing procedure would run afoul of the Double Jeopardy Clause of the Fifth Amendment. A procedure that allowed the prosecution to try to persuade any one of a series of entities (the jury, the trial judge and the appellate courts) of the presence of the *Enmund* findings would constitute a constitutionally impermissible attempt to "give[ ] the Government the opportunity to convince a second fact finder of its view of the facts." *Bullington v. Missouri*, 451 U.S. 430, 440 (1981); *see also Swisher v. Brady*, 438 U.S. 204, 216 (1978) ("The Double Jeopardy Clause also precludes the prosecutor from 'enhanc[ing] the risk that an innocent defendant may be convicted,' *Arizona v. Washington*, [434 U.S. 497, 504 (1978)], by taking the question of guilt to a series of persons or groups empowered to make binding determinations."); *cf. Caldwell v. Mississippi*, 105 S. Ct. 2633, 2641 (1985) ("a sentence of life in prison could not be increased to a death sentence on appeal" (citing *Arizona v. Rumsey*, 104 S. Ct. 2305 (1984)); *Spaziano v. Florida*, 104 S. Ct. 3154, 3162 (1984) (sentencer's decision for life is final).

supported the conclusion that petitioner was guilty of that offense," which made the kidnapping an aggravating circumstance. 439 U.S. at 15-16. This Court reversed, on due process grounds, because the state appellate court could not provide the finding that had to be made by the jury. The Court noted that due process prohibits sending an accused to prison "following conviction of a charge on which he was never tried," and that

> [t]o conform to due process of law, petitioners were entitled to have the validity of their convictions appraised on consideration of the case as it was tried and *as the issues were determined in the trial court.*

Id. at 16 (emphasis added) (quoting *Cole v. Arkansas*, 333 U.S. 196, 202 (1948)). The Court held that

> [t]hese fundamental principles of procedural fairness apply with no less force at the penalty phase of a trial in a capital case than they do in the guilt-determining phase of any criminal trial.

439 U.S. at 16 (citation omitted).[45] *Presnell* established that findings by an appellate court are not a sufficient basis for imposing the death penalty.

Similarly, in *Gardner v. Florida*, 430 U.S. 349 (1977), the Court reversed a death sentence and remanded the case for a new sentencing hearing because in imposing the sentence the trial judge had relied, in part, on a report not made available to the defendant. The Court rejected the possibility of simply remanding the case to the Florida Supreme Court to consider the report in its reviewing function.

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45 The dissent in *Presnell* agreed that due process would be violated "if . . . the Supreme Court of Georgia had found petitioner guilty of kidnapping with bodily injury in spite of a failure of the jury to return a proper guilty verdict for that crime." 439 U.S. at 17-18 (Powell, J., dissenting). The dissent simply disagreed with the majority's reading of the Georgia Supreme Court's opinion.

> That procedure, however, could not fully correct the error. For it is possible that full disclosure, followed by explanation or argument by defense counsel, would have caused the trial judge to accept the jury's advisory verdict. Accordingly, the death sentence is vacated, and the case is remanded to the Florida Supreme Court with directions to order further proceedings *at the trial court level* not inconsistent with this opinion.

Id. at 362 (plurality opinion) (emphasis added); *cf. Lockett v. Ohio*, 438 U.S. 587, 627 (1978) (White, J., concurring in part and dissenting in part) (death sentence should be reversed because "no findings were made either *during the trial or sentencing stage of the process* that Bell intended the death of the victim . . ." (emphasis added)).

Moreover, the limited role of an appellate court on review makes it an inappropriate body to give the "individualized consideration [which is] a constitutional requirement in imposing the death sentence." *Lockett v. Ohio*, 438 U.S. 586, 605 (1978) (plurality opinion) (footnote omitted). As the Court recently explained in reversing the death sentence in *Caldwell v. Mississippi*, 105 S. Ct. 2633 (1985), because the prosecutor's arguments may have led the jury to believe that the responsibility for determining the appropriateness of the death penalty rested with the appellate court:

> Bias against the defendant clearly stems from the institutional limits on what an appellate court can do. . . . The "delegation" of sentencing responsibility that the prosecutor here encouraged would thus not simply postpone the defendant's right to a fair determination of the appropriateness of his death; rather it would deprive him of that right, for an appellate court, unlike a capital sentencing jury, is wholly ill-suited to evaluate the appropriateness of death in the first instance. Whatever intangibles a jury might consider in its sentencing determination, few can be gleaned from an appellate record. This inability to confront and examine the individuality of the defendant would be particularly devastating to any argu-

> ment for consideration of what this Court has termed "[those] compassionate or mitigating factors stemming from the diverse frailties of humankind."

Id. at 2640 (citation omitted);[46] *cf. Lyons v. Oklahoma*, 322 U.S. 596 (1944):

> where there is a dispute as to whether the acts which are charged to be coercive actually occurred, or where different inferences may fairly be drawn from admitted facts, the trial judge and the jury are not only in a better position to appraise the truth or falsity of the defendant's assertions from the demeanor of the witnesses but the legal duty is upon them to make the decision. . . . The fact that there is evidence which would justify a contrary conclusion is immaterial. To triers of fact is left the determination of the truth or error of the testimony of prisoner and official alike.

Id. at 602-03.

Allowing an appellate court to make the findings from a cold paper record would introduce "a level of uncertainty and unreliability [in] the factfinding process that cannot be tolerated in a capital case." *Beck v. Alabama*, 447 U.S. 625, 643 (1980).

Factual findings necessary to support imposition of the death penalty must be made at the trial level. They cannot be supplied by an appellate court. Because there were no *Enmund* findings by the judge or the jury at Bullock's trial or sentencing, his death sentence was properly vacated.

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46 *See also id.* at 2645 n.7:

> It is beyond question that an appellate court, performing its task with a presumption of correctness, would be relatively incapable of evaluating the "literally countless factors that [a capital sentencer] consider[s,]" [*Zant v. Stephens*, 462 U.S. 862, 901 (1983) (Rehnquist, J., concurring)], in making what is largely a moral judgment of the defendant's desert.

IV

EVEN IF THE *ENMUND* FINDINGS COULD BE MADE BY A STATE APPELLATE COURT, NO SUCH FINDINGS WERE MADE HERE.

Even if it were to be held that the *Enmund* findings could be made by a state appellate court, the judgment below should still be affirmed because there were no such findings by the Mississippi Supreme Court.

The Mississippi Supreme Court did not purport to engage in fact-finding. It did not disclose the basis for its recitation of the case—*i.e.*, it did not say if it was drawing its own conclusions based on its review of the record. Rather, it is more likely that the court was using the normal standard of appellate review and viewing the evidence in the light most favorable to the state.[47] Moreover, the case against Bullock—from the Mississippi felony murder statute, to the indictment, to the prosecution, to the jury instructions—was consistently based on the theory that he aided and abetted in the robbery, and "that it was not necessary, either for the felony murder conviction or for the sentence to death, to find that Bullock had either the intent to kill or any personal participation in the killing." *Bullock v. Lucas*, 743 F.2d at 248 (A 19) (Garwood, J., concurring). It is clear that the decision of the Mississippi Supreme Court affirming Bullock's conviction and death sentence was based on precisely the same theory of accomplice liability—since Bullock aided and abetted in a robbery in the course of which the victim was killed he could be sentenced to death under the Mississippi capital felony murder statute:

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47 The Mississippi Supreme Court has emphasized the "severely limited" nature of its review in capital cases, *Williams v. State*, 445 So. 2d 798, 811 (Miss. 1984), *cert. denied*, 105 S. Ct. 803 (1985) under which the jury makes the determination of who will be sentenced to death, "and all review is then conducted with a presumption of its correctness." *Wiley v. Mississippi*, 449 So. 2d 756, 762 (Miss. 1984).

> The law is well settled in this state that any person who is present, aiding and abetting another in the commission of a crime, is equally guilty with the principal offender.

Bullock v. State, 391 So. 2d 601, 614 (Miss. 1980) (citations omitted) (A 116). The court's recitation of facts limits Bullock's involvement (other than in disposing of the body) to the two times he grabbed Dickson; the court made no statement as to Bullock's motive in grabbing Dickson. The furthest the court went in implicating Bullock in the crime was its statement that Bullock "was an active participant in the assault and homicide. . . ." *Id.* at 614 (A 117); *see also id.* at 606 (A 81) (Bullock was "present, aiding and assisting in the assault upon, and slaying of, Dickson. . . ."). The influence of aiding and abetting or accomplice liability is apparent in these statements, and nowhere is there an express finding of any of the *Enmund* factors. This is hardly surprising since the theory of the prosecution was based on Bullock's role as an accomplice in the robbery, and since the court decided Bullock's appeal before *Enmund* was decided.

Under these circumstances, even if the *Enmund* findings could be made by a state appellate court, the opinion of the Mississippi Supreme Court cannot be construed as making any *Enmund* findings.[48] The federal habeas corpus statute provides that state court determinations are not entitled to a presumption of correctness if "the merits of the factual dispute were not resolved in the State court hearing," 28 U.S.C. § 2254(d)(1) (1982), and the dispute about the presence of the *Enmund*

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48 Petitioners concede that the Mississippi Supreme Court did not make any findings "couched in the terms of the *Enmund* criteria," Pet. Brief at 86, but urge that "implicitly" there was "substantial compliance with the [*Enmund* criteria]." *Id.* Because of the unique nature of the death penalty, "unique safeguards," *Spaziano v. Florida*, 104 S. Ct. 3154, 3167 (1984) (Stevens, Brennen and Marshall, JJ., concurring in part and dissenting in part), are necessary to ensure "reliability in the determination that death is the appropriate remedy. . . ." *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (plurality opinion). "Implicit substantial compliance" with constitutional requirements cannot support a death sentence. *See, e.g., Eddings v. Oklahoma*, 455 U.S. 104 (1982); *Presnell v. Georgia*, 439 U.S. 14 (1978) (per curiam); *Gardner v. Florida*, 430 U.S. 349 (1977).

factors was not resolved by the Mississippi Supreme Court. As the Court stated in *Townsend v. Sain*, 372 U.S. 293 (1963), in discussing state court findings of fact,

> [t]here cannot even be the semblance of a full and fair hearing unless the state court actually reached and decided the issues of fact tendered by the defendant.

Id. at 313-14.

Where, as here, no express findings of fact were made by the state court, it may still be possible to reconstruct the finding from other indicia in the court's opinion, but

> [r]econstruction is not possible if it is unclear whether the state finder applied correct constitutional standards in disposing of the claim.

Id. at 314. In *Time, Inc. v. Firestone*, 424 U.S. 448 (1976), the Court reversed a civil judgment because there was no clear indication that the state courts had made a critical factual determination.

> Even where a question of fact may have constitutional significance, we normally accord findings of state courts deference in reviewing constitutional claims here. But that deference is predicated on our belief that at some point in the state proceedings some factfinder has made a conscious determination of the existence or nonexistence of the critical fact. Here the record before us affords no basis for such a conclusion.

Id. at 463 (citations omitted).[49] If reversal is required in a civil case where it is unclear that a critical fact has been found, *a*

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49 In *Time*, the Court held that there was insufficient evidence of a finding of fault by the Florida Supreme Court, even though that court stated that Time's report was a "flagrant example of 'journalistic negligence.' " *Id.* at 463 (quoting *Firestone v. Time, Inc.*, 305 So. 2d 172, 178 (Fla. 1974)). Without some clear indication, the Court was unwilling to "attribute to the Supreme Court of Florida . . . an intention to find such a fact in the first instance." 424 U.S. at 463. There is no indication in the Mississippi Supreme Court's opinion of "an intention to find [the *Enmund* factors] in the first instance."

fortiori, a death sentence cannot stand under such circumstances.

The Mississippi Supreme Court made no express findings of fact in affirming Bullock's conviction and sentence. Moreover, it is clear that the Mississippi Supreme Court did not apply the correct constitutional standard: as noted above, its decision predated *Enmund*, contains no *Enmund* analysis, and the court clearly relied on the accomplice liability theory invalidated in *Enmund* as a basis for capital punishment. Under these circumstances,

> any hypothesis as to the relevant factual determinations of [the Mississippi Supreme Court] involves the purest speculation.

Townsend, 372 U.S. at 315.

A sentence of death should not stand on such a tenuous basis.

CONCLUSION

Following a conviction for felony murder, Bullock was sentenced to death by a jury that was not required to find that he killed, attempted to kill, intended to kill, or contemplated the use of lethal force. The constitutional infirmity of the capital sentencing statute under which Bullock was sentenced to death was recognized by this Court in *Enmund* and has since been acknowledged and corrected by the Mississippi legislature.

Bullock is entitled to a jury determination of his "personal responsibility and moral guilt," *Enmund*, 458 U.S. at 801, before he may be sentenced to death. He has been deprived of that constitutional right. Mississippi should not be allowed one last cruel and unusual punishment before complying with the requirements of *Enmund* and its own corrected capital sentencing statute.

Bullock's death sentence was properly vacated by the Court of Appeals. The decision below should be affirmed.

Dated: New York, New York
September 9, 1985

Respectfully submitted,

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APPENDIX

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STATUTORY MATERIALS

MISS. CODE ANN. § 97-3-19 (since amended)

§ 97-3-19. HOMICIDE; MURDER DEFINED; CAPITAL MURDER.

(1) The killing of a human being without the authority of law by any means or in any manner shall be murder in the following cases:

(a) When done with deliberate design to effect the death of the person killed, or of any human being;

(b) When done in the commission of an act eminently dangerous to others and evincing a depraved heart, regardless of human life, although without any premeditated design to effect the death of any particular individual;

(c) When done without any design to effect death by any person engaged in the commission of any felony other than rape, kidnapping, burglary, arson or robbery, or in any attempt to commit such felonies.

(2) The killing of a human being without the authority of law by any means or in any manner shall be capital murder in the following cases:

(a) Murder which is perpetrated by killing a peace officer or fireman while such officer or fireman is acting in his official capacity or by reason of an act performed in his official capacity, and with knowledge that the victim was a peace officer or fireman. For purposes of this paragraph, the term "peace officer" means sheriffs of counties and their deputies, constables, marshals and policemen of cities and towns, game wardens, parole officers, a judge, prosecuting attorney or any other court official, agents of the alcoholic beverage control division of the state tax

commission, agents of the bureau of narcotics, personnel of the Mississippi Highway Patrol, and the superintendent and his deputies, guards, officers and other employees of the Mississippi State Penitentiary;

(b) Murder which is perpetrated by a person who is under sentence of life imprisonment;

(c) Murder which is perpetrated by use or detonation of a bomb or explosive device;

(d) Murder which is perpetrated by any person who has been offered or has received anything of value for committing the murder, and all parties to such a murder, are guilty as principals;

(e) When done with or without any design to effect death, by any person engaged in the commission of the crime of rape, burglary, kidnapping, arson or robbery, or in any attempt to commit such felonies;

(f) Murder which is perpetrated by the killing of any elected official of a county, municipal, state or federal government with knowledge that the victim was such public official.

MISS. CODE ANN. § 99-19-101 (since amended)

§ 99-19-101. JURY TO DETERMINE PUNISHMENT IN CAPITAL CASES IN SEPARATE SENTENCING PROCEEDING: AGGRAVATING AND MITIGATING CIRCUMSTANCES TO BE CONSIDERED.

(1) Upon conviction or adjudication of guilt of a defendant of capital murder or other capital offense, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. If, through impossibility or inability, the trial jury is unable to reconvene for a hearing on the issue of penalty, having determined the guilt of the accused, the trial judge may summon a jury to determine

the issue of the imposition of the penalty. If the trial jury has been waived, or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose. In the proceeding, evidence may be presented as to any matter that the court deems relevant to sentence, and shall include matters relating to any of the aggravating or mitigating circumstances. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitutions of the United States or of the State of Mississippi. The state and the defendant and/or his counsel shall be permitted to present arguments for or against the sentence of death.

(2) After hearing all the evidence, the jury shall deliberate on the following matters:

(a) Whether sufficient aggravating circumstances exist as enumerated in subsection (5) of this section;

(b) Whether sufficient mitigating circumstances exist as enumerated in subsection (6) of this section, which outweigh the aggravating circumstances found to exist; and

(c) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death.

(3) For the jury to impose a sentence of death, it must unanimously find in writing the following:

(a) That sufficient aggravating circumstances exist as enumerated in subsection (5) of this section; and

(b) That there are insufficient mitigating circumstances, as enumerated in subsection (6), to outweigh the aggravating circumstances.

In each case in which the jury imposes the death sentence, the determination of the jury shall be supported by specific written findings of fact based upon the circumstances in subsections (5) and (6) of this section and upon the records of the trial and the sentencing proceedings. If the jury does not make the findings requiring the death sentence, the court shall impose a sentence of life imprisonment.

(4) The judgment of conviction and sentence of death shall be subject to automatic review by the supreme court of Mississippi within sixty (60) days after certification by the sentencing court of entire record, unless the time is extended for an additional period by the supreme court for good cause shown. Such review by the supreme court shall have priority over all other cases and shall be heard in accordance with rules promulgated by the supreme court.

(5) Aggravating circumstance shall be limited to the following:

(a) The capital offense was committed by a person under sentence of imprisonment.

(b) The defendant was previously convicted of another capital offense or of a felony involving the use or threat of violence to the person.

(c) The defendant knowingly created a great risk of death to many persons.

(d) The capital offense was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, rape, arson, burglary, kidnapping, aircraft piracy or the unlawful use or detonation of a bomb or explosive device.

(e) The capital offense was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(f) The capital offense was committed for pecuniary gain.

(g) The capital offense was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(h) The capital offense was especially heinous, atrocious or cruel.

(6) Mitigating circumstances shall be the following:

(a) The defendant has no significant history of prior criminal activity.

(b) The offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(c) The victim was a participant in the defendant's conduct or consented to the act.

(d) The defendant was an accomplice in the capital offense committed by another person and his participation was relatively minor.

(e) The defendant acted under extreme duress or under the substantial domination of another person.

(f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired.

(g) The age of the defendant at the time of the crime.

MISS. CODE ANN. § 9-19-101 (Cum. Supp. 1984)*

§ 99-19-101. JURY TO DETERMINE PUNISHMENT IN CAPITAL CASES IN SEPARATE SENTENCING PROCEEDING; AGGRAVATING AND MITIGATING CIRCUMSTANCES TO BE CONSIDERED.

(1) Upon conviction or adjudication of guilt of a defendant of capital murder or other capital offense, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. If, through impossibility or inability, the trial jury is unable to reconvene for a hearing on the issue of penalty, having determined the guilt of the accused, the trial judge may summon a jury to determine

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* Language added by 1983 amendment is italicized.

the issue of the imposition of the penalty. If the trial jury has been waived, or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose. In the proceeding, evidence may be presented as to any matter that the court deems relevant to sentence, and shall include matters relating to any of the aggravating or mitigating circumstances. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitutions of the United States or of the State of Mississippi. The state and the defendant and/or his counsel shall be permitted to present arguments for or against the sentence of death.

(2) After hearing all the evidence, the jury shall deliberate on the following matters:

(a) Whether sufficient factors exist as enumerated in subsection (7) of this section;

(b) Whether sufficient aggravating circumstances exist as enumerated in subsection (5) of this section;

(c) Whether sufficient mitigating circumstances exist as enumerated in subsection (6) of this section, which outweigh the aggravating circumstances found to exist; and

(d) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death.

(3) For the jury to impose a sentence of death, it must unanimously find in writing the following:

(a) That sufficient factors exist as enumerated in subsection (7) of this section;

(b) That sufficient aggravating circumstances exist as enumerated in subsection (5) of this section;

(c) That there are insufficent mitigating circumstances, as enumerated in subsection (6), to outweigh the aggravating circumstances.

In each case in which the jury imposes the death sentence, the determination of the jury shall be supported by specific

written findings of fact based upon the circumstances in subsections (5) and (6) of this section and upon the records of the trial and the sentencing proceedings. If the jury does not make the findings requiring the death sentence, the court shall impose a sentence of life imprisonment.

(4) The judgment of conviction and sentence of death shall be subject to automatic review by the supreme court of Mississippi within sixty (60) days after certification by the sentencing court of entire record, unless the time is extended for an additional period by the supreme court for good cause shown. Such review by the supreme court shall have priority over all other cases and shall be heard in accordance with rules promulgated by the supreme court.

(5) Aggravating circumstances shall be limited to the following:

(a) The capital offense was committed by a person under sentence of imprisonment.

(b) The defendant was previously convicted of another capital offense or of a felony involving the use or threat of violence to the person.

(c) The defendant knowingly created a great risk of death to many persons.

(d) The capital offense was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, rape, arson, burglary, kidnapping, aircraft piracy, sexual battery, unnatural intercourse with any child under the age of twelve (12), or nonconsensual unnatural intercourse with mankind, or felonious abuse and/or battery of a child in violation of subsection (2) of section 97-5-39, or the unlawful use or detonation of a bomb or explosive device.

(e) The capital offense was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(f) The capital offense was committed for pecuniary gain.

(g) The capital offense was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(h) The capital offense was especially heinous, atrocious or cruel.

(6) Mitigating circumstance shall be the following:

(a) The defendant has no significant history of prior criminal activity.

(b) The offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(c) The victim was a participant in the defendant's conduct or consented to the act.

(d) The defendant was an accomplice in the capital offense committed by another person and his participation was relatively minor.

(e) The defendant acted under extreme duress or under the substantial domination of another person.

(f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

(g) The age of the defendant at the time of the crime.

(7) In order to return and impose a sentence of death the jury must make a written finding of one or more of the following:

(a) The defendant actually killed;

(b) The defendant attempted to kill;

(c) The defendant intended that a killing take place;

(d) The defendant contemplated that lethal force would be employed.

MISS. CODE ANN. § 99-19-103 (19) (Cum. Supp. 1984)

§ 99-19-103. INSTRUCTIONS; AGGRAVATING CIRCUMSTANCES SHALL BE DESIGNATED BY JURY IN WRITING; EFFECT OF JURY'S FAILURE TO AGREE ON PUNISHMENT.

The statutory instructions as determined by the trial judge to be warranted by the evidence shall be given in the charge and in writing to the jury for its deliberation. The jury, if its verdict be a unanimous recommendation of death, shall designate in writing, signed by the foreman of the jury, the statutory aggravating circumstance or circumstances which it unanimously found beyond a reasonable doubt. Unless at least one (1) of the statutory aggravating circumstances enumerated in section 99-19-101 is so found or if it is found that any such aggravating circumstance is overcome by the finding of one or more mitigating circumstances, the death penalty shall not be imposed. If the jury cannot, within a reasonable time, agree as to punishment, the judge shall dismiss the jury and impose a sentence of imprisonment for life.